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No. 07-548

In the Supreme Court of the United States

CURTIS A. BEASLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government's filing of an information identifying petitioner's prior convictions under 21 U.S.C. 851(a)(1) before the jury was sworn, but after voir dire began, was neither jurisdictional error nor reversible plain error.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 495 F.3d 142. The judgment of the district court (Pet. App. 13a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2007. The petition for a writ of certiorari was filed on October 23, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted of one count of conspiracy to distribute at least five grams but less than 50 grams of crack cocaine, in violation of 21 U.S.C. 846 and 21 U.S.C. 841(a)(1); and

one count of possession of five grams or more of crack cocaine with intent to distribute, in violation of 21 U.S.C. 841(b)(1)(B). He was sentenced to concurrent terms of imprisonment for 408 months, to be followed by eight years of supervised release. The court of appeals affirmed.

1. Under 21 U.S.C. 851(a)(1), no person convicted of an offense under the federal drug statutes shall be sentenced to a statutorily enhanced punishment based on his prior convictions "unless before trial, or before entry of a plea of guilty," the United States Attorney files an information "stating in writing the previous convictions to be relied upon." If the United States Attorney cannot obtain the facts about the prior convictions with due diligence before trial or before entry of the plea, the district court may postpone the trial or the taking of the plea "for a reasonable period for the purpose of obtaining such facts." *Ibid.*

If an information is filed under Section 851(a)(1), the district court, after trial but before sentencing, will inquire whether the defendant admits or denies the prior convictions, and will inform the defendant that "any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence." 21 U.S.C. 851(b).

Section 851(c) provides that if the defendant denies the allegations of a prior conviction, the district court shall hold a hearing on the issue. Section 851(c)(2) provides that any challenge to a prior conviction that is not raised before sentence is imposed "shall be waived unless good cause be shown for failure to make a timely challenge." Section 851(e) bars a defendant from challenging the validity of any prior conviction that occurred more than five years before the date of the information.

2. Petitioner and Charles Mattison were crack cocaine dealers in South Carolina. In the early 2000s, law enforcement agents investigated and then arrested both men. Petitioner and Mattison then confessed that they were crack dealers. See Gov't C.A. Br. 3-4.

On January 12, 2004—one week after the jury had been selected, but two weeks before the jury was sworn and opening statements were made—the government filed an information setting forth petitioner's prior convictions for felony drug convictions that would enhance the minimum and maximum statutory penalties under Section 841(b)(1)(B). Pet. App. 3a. Petitioner's prior convictions included a 1994 conviction for possession with intent to distribute crack cocaine and a 1995 conviction for conspiracy to possess with intent to distribute crack cocaine.[1] Petitioner did not object in the district court to the timeliness of that information. *Id.* at 2a-3a.

After the jury found petitioner guilty, the Presentence Report (PSR) stated that he was subject to a statutory range of ten years to life imprisonment and a minimum term of eight years of supervised release on the drug conspiracy conviction under Sections 841(b)(1)(B) and 851, and to a statutory range of five to 40 years imprisonment and a minimum of four years of supervised release on the substantive drug conviction under Section 841(b)(1)(B). C.A. App. 1048-1049.

The PSR also determined that petitioner was a career offender under United States Sentencing Guidelines § 4B1.1 (U.S.S.G.) based on his prior convictions,

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[1] The Section 851(a)(1) information stated that petitioner was convicted on both offenses on April 3, 1996. 02-CR-1358 Docket entry No. 286 (D.S.C. Jan. 12, 2004). The Presentence Report stated that the first conviction was for a state offense whereas the second conviction was for a federal offense. C.A. App. 1042-1043.

which resulted in a total offense level of 37 and a criminal history category of VI, yielding a Guidelines sentencing range of 360 months to life imprisonment. C.A. App. 1042-1045.

At sentencing, petitioner did not challenge the validity of his 1994 and 1995 convictions for purposes of the statutory enhancement—presumably because Section 851(e) barred any challenge to the validity of convictions more than five years old. Petitioner objected to the PSR's designation of him as a career offender on the ground that using his prior convictions violated his right to a jury decision on drug quantity under *Blakely* v. *Washington*, 542 U.S. 296 (2004). The district court overruled the objection, adopted the PSR's findings and Guideline computations, and sentenced petitioner to 408 months of imprisonment, to be followed by eight years of supervised release. C.A. App. 916-924.

Anticipating this Court's later decision in *United States* v. *Booker*, 543 U.S. 220 (2005), the district court stated on the record that, "[i]f the guidelines were not applicable, * * * an appropriate sentence would have been 38 years" (*i.e.*, four years longer than the actual sentence). C.A. App. 924.

3. On appeal, petitioner claimed for the first time that his enhanced sentence was illegal because the government failed to file the Section 851(a)(1) information "before trial." He maintained that the untimely filing was a jurisdictional defect that excused his failure to object to the timeliness of the filing at trial. The court of appeals rejected his contention, holding that Section 851 does not implicate a district court's jurisdiction. The court therefore reviewed petitioner's claim only for plain error under Federal Rule of Criminal Procedure 52(b)

and found that the asserted error was not "plain." Pet. App. 1a-12a.

The court of appeals explained that jurisdiction refers to a court's power to try a case. Pet. App. 4a. A district court is granted jurisdiction over criminal offenses, the court noted, by 18 U.S.C. 3231, and that jurisdiction necessarily includes the power to impose criminal penalties for an offense. If a district court imposes a penalty outside a statutory range or ignores a statutory mandate, the court concluded, it is not acting without power; it is simply exercising its power erroneously. Pet. App. 5a-6a (relying on *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 90 (1998)). While the court acknowledged the existence of contrary authority, it joined the majority of circuits that have held that Section 851 is not jurisdictional. *Id.* at 7a.

The court then reviewed petitioner's forfeited claim for plain error. It recognized that under Rule 52(b), a defendant must show that there was an "(1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." Pet. App. 7a (quoting, among others, *Johnson* v. *United States*, 520 U.S. 461, 467 (1997)).

The court of appeals noted that petitioner had argued that the statutory phrase "before trial" means before jury selection begins, while the government had argued that the phrase means before the jury is sworn. Pet. App. 8a. In the court's view, "[t]he term 'before trial' is surely ambiguous." Pet. App. 9a. The court took note of its recognition in an earlier case that the beginning of a trial may be defined differently in different

contexts. *Ibid.* (discussing *DeLoach* v. *Lorillard Tobacco Co.*, 391 F.3d 551, 563 (4th Cir. 2004)). The court of appeals then concluded that, because

> there is no controlling precedent—either in the Supreme Court or in our court—on the issue of when a trial begins for purposes of defining "before trial" in § 851(a)(1), we cannot say that it was error for the district court to assume that a § 851 information filed after the jury was selected but before it was sworn was timely filed.

Id. at 9a-10a (relying on *United States* v. *Lejarde-Rada*, 319 F.3d 1288, 1291 (11th Cir. 2003), which held that, "where the explicit language of a statute or rule does not specifically resolve an issue, there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it"). Because it determined that the district court's assumption that the government had filed its Section 851 information "before trial" was not a "plain" error, the court of appeals did not take notice of it. Pet. App. 10a.[2]

ARGUMENT

1. Petitioner contends (Pet. 5-10) that, when an information identifying prior convictions that support an enhanced sentence is not timely filed under 21 U.S.C. 851(a)(1), the untimely filing is a jurisdictional defect that bars a court from imposing an enhanced sentence and requires reversal of the enhanced sentence even if a defendant does not object at trial. Only one court of appeals has accepted that contention, and its reasoning

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[2] The court of appeals also rejected petitioner's Sixth Amendment challenge to his sentence and his objections to two evidentiary rulings. Pet. App. 10a-12a. The petition does not renew those claims.

is seriously undermined by later decisions of this Court. The majority of the courts to address the issue have correctly held that the timing requirements of Section 851 are not jurisdictional. This Court's intervention is not warranted at present. In any event, this case is not an appropriate vehicle to address the question.

a. At the outset, both petitioner and the court of appeals appear to have assumed that petitioner's sentence can only be supported by an enhancement under 21 U.S.C. 841(b)(1)(B) and 851. As the government noted in its brief in the court of appeals, however, that assumption is mistaken. See Gov't C.A. Br. at 12 (calling petitioner's Section 851 argument "without merit because the district court clearly based its sentence on career criminal status rather than § 851 enhancement"); *id.* at 20 ("Even if the Court determines that the Notice was not filed in a timely manner in this case, [petitioner] suffered no harm as his sentence was based on his career offender status not on the § 851 enhancement."). At sentencing, the district court expressly referred to petitioner's "career offender status" as "a result of his prior convictions." C.A. App. 915. It also adopted the guidelines calculations in the PSR, including a total offense level of 37 and criminal history level of VI. *Id.* at 920-921. In the PSR, each of those numbers was a direct consequence of petitioner's status as a career offender under Sentencing Guidelines § 4B1.1. C.A. App. 1042, 1045.[3]

Based on his conspiracy and substantive drug convictions involving five grams of crack cocaine under Section 841(b)(1)(B)(iii), petitioner faced a statutory prison term

[3] As noted above, the PSR also stated the mandatory minimum and maximum sentences under Sections 841(b)(1)(B) and 851. C.A. App. 1048-1049.

of five to 40 years and a minimum of four years of supervised release on each count. As a result of Section 851 and his prior conviction, the statutory range for petitioner's potential sentence would have been enhanced to ten years to life imprisonment and to a minimum of eight years of supervised release. 21 U.S.C. 841(b)(1)(B). The sentence that petitioner received as a career offender under the Guidelines—408 months of imprisonment (*i.e.*, 34 years) and eight years of supervised release—was well within the *unenhanced* statutory range of five to 40 years and four-years-to-life term of supervised release under Section 841(b)(1)(B). When a defendant is sentenced as a career offender under Sentencing Guidelines § 4B1.1 and the sentence falls within the unenhanced statutory range, the government does not have to file a Section 851(a)(1) information at all.[4] See, *e.g.*, *United States* v. *Ramirez*, 454 F.3d 380, 381-382 (2d Cir.), cert. denied, 127 S. Ct. 526 (2006); *United States* v. *Frisby*, 258 F.3d 46, 51 (1st Cir. 2001); *Damerville* v. *United States*, 197 F.3d 287, 289-290 (7th Cir. 1999), cert. denied, 529 U.S. 1136 (2000).

Thus, the government did not have to file a Section 851(a)(1) information in this case, much less a timely one, to support the sentence that petitioner challenges.

b. Even assuming that Section 851 is necessary to petitioner's sentence, the Fourth Circuit's holding that Section 851 is not a jurisdictional statute is correct. This

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[4] The potential sentence enhancement under 21 U.S.C. 841(b)(1)(B) and 851 is not co-extensive with the career-offender guideline, U.S.S.G. § 4B1.1. Section 841(b)(1)(B) enhances a defendant's sentence based on "a prior conviction" for a "felony drug offense," but a career-offender designation under Sentencing Guidelines § 4B1.1(a) requires two prior felony convictions that can be for either a "crime of violence" or a "controlled substance offense."

Court has repeatedly stated that "jurisdiction" refers to a court's power to act, and not every error in exercising judicial authority is a jurisdictional one.

In *United States* v. *Cotton*, 535 U.S. 625 (2002), the Court held that an indictment that omitted a specification of drug quantity that served to enhance the defendant's sentence was not a jurisdictional error. The Court stated that the term "jurisdiction" refers to a court's statutory or constitutional power to adjudicate a case, which can never be forfeited or waived. *Id.* at 630. Emphasizing that the right to indictment by a grand jury can be waived, the Court held that a defective indictment did not deprive a court of jurisdiction to impose an enhanced sentence. *Id.* at 630-631.

In *Kontrick* v. *Ryan*, 540 U.S. 443 (2004), the Court held that a time limitation in Federal Rule of Bankruptcy Procedure 4004(a) was not a jurisdictional rule. *Kontrick* emphasized that "[c]larity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." 540 U.S. at 455. Later, in *Eberhart* v. *United States*, 546 U.S. 12 (2005), the Court, relying in part on *Kontrick*, held that the time limits for filing a motion for a new trial in Federal Rule of Criminal Procedure 33 are non-jurisdictional claim-processing rules. *Id.* at 15-20.

In light of those cases, the "before trial" requirement in Section 851(a)(1) is not a "jurisdictional" one. The jurisdiction of district courts for criminal cases is set forth in 18 U.S.C. 3231. Once a district court has acquired such jurisdiction, neither that statute nor any

other purports to divest it of jurisdiction simply because of a statutory or rule violation in adjudicating the case.

The purposes of Section 851 underscore that it is not a jurisdictional requirement. The primary purpose of Section 851 is to provide reasonable notice to the defendant of a recidivist enhancement and an opportunity to be heard, including the right to challenge a prior conviction that may be used to enhance his sentence. *United States* v. *Pritchett*, 496 F.3d 537, 548 (6th Cir. 2007); *United States* v. *Jackson*, 121 F.3d 316, 319 (7th Cir. 1997). Section 851 "allows the defendant ample time to determine whether he should enter a plea or go to trial, and to plan his trial strategy with full knowledge of the consequences of a potential guilty verdict." *Prou* v. *United States*, 199 F.3d 37, 44 (1st Cir. 1999) (quoting *United States* v. *Johnson*, 944 F.2d 396, 407 (8th Cir.), cert. denied, 502 U.S. 1008 (1991), 502 U.S. 1078, and 504 U.S. 977 (1992)). Those interests protect a defendant's individual rights; they do not serve to limit the class of cases over which a court has cognizance. And in this case, nothing suggests that the filing of the information two weeks before the jury was sworn deprived petitioner of the time he needed to determine whether to go to trial, to plan his trial strategy, or to challenge the specified prior convictions.

Section 851(a)(1)'s "before trial" requirement uses a mandatory term ("shall"), but that does not make the statute a jurisdictional one. Even an "inflexible claim-processing rule" that must be enforced upon timely objection is not thereby transformed into "a rule governing subject-matter jurisdiction." *Kontrick*, 540 U.S. at 456; see *Eberhart*, 546 U.S. at 19 ("These claim-processing rules thus assure relief to a party properly raising them, but do not compel the same result if a party forfeits

them."). Furthermore, Section 851 does not prevent a defendant from waiving his right to challenge the timeliness of the government's Section 851(a)(1) information. The default rule is that a defendant can waive most statutory or regulatory provisions. See, *e.g.*, *New York* v. *Hill*, 528 U.S. 110 (2000) (Interstate Agreement on Detainers statute); *United States* v. *Mezzanatto*, 513 U.S. 196 (1996) (plea bargaining statements under Fed. R. Crim. P. 11(e)(6) and Fed. R. Evid. 410). And, as *Cotton* indicates, when a right is waivable, an error is unlikely to be jurisdictional. 535 U.S. at 630-631.

Petitioner's reliance (Pet. 7-9) on *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007), is misplaced. In *Bowles*, the Court held that a party's filing of a notice of appeal outside the 30-day time limit of Federal Rule of Appellate Procedure 4(a)(1)(A) and 28 U.S.C. 2107(a) was a jurisdictional defect. Petitioner argues that *Bowles* controls this case because Section 851(a)(1) is a statute instead of a rule of procedure, but that position overlooks that a district court already has jurisdiction over a criminal proceeding by virtue of 18 U.S.C. 3231. That jurisdiction entails the power to determine sentences under 18 U.S.C. 3551 and 3553. Petitioner claims (Pet. 8) that Section 851's provision establishing "the sentencing court's power to consider an enhanced sentence" is comparable to the provision in *Bowles* that established "the court of appeals' power of review." But, unlike a notice of appeal in a civil case, Section 851 does not bring a case before a court.[5] Section 851 is more akin to the statutory limitation at issue in *Scarborough* v. *Principi*,

[5] For the same reason, petitioner's analogy (Pet. 9) between a Section 851 information and a decision to charge a case fails. Both involve prosecutorial discretion, but while an initial charge may be necessary to invoke a court's jurisdiction, a Section 851 notice is not.

541 U.S. 401 (2004), in which the Court invoked *Kontrick* and held that the time limit for filing an application for attorney's fees in an already-pending case was "not properly typed 'jurisdictional.'" *Id.* at 414. *Bowles* distinguished *Scarborough* as "concern[ing] 'a mode of relief . . . ancillary to the judgment of a court' that already had plenary jurisdiction." 127 S. Ct. at 2365 (quoting *Scarborough*, 541 U.S. at 413). The same is true here for the district court that already had jurisdiction over the criminal case against petitioner.[6]

Because an untimely Section 851(a)(1) information is not properly considered a "jurisdictional" defect, the court of appeals correctly reviewed petitioner's unpreserved claim only for plain error. Cf. *Cotton*, 535 U.S. at 631-632 (applying plain error review to non-jurisdictional error in indictment).

c. Most of the courts of appeals have rejected petitioner's argument (Pet. 7-10) that the timely filing of a Section 851 information is a jurisdictional requirement, either squarely holding or otherwise stating that Section 851(a)(1) sets forth non-jurisdictional procedural requirements for an enhanced sentence. See *Pritchett*, 496 F.3d at 541-547 (6th Cir.); *United States* v. *Flowers*, 464 F.3d 1127, 1129-1130 (10th Cir. 2006); *Sapia* v. *United States*, 433 F.3d 212, 216-217 (2d Cir. 2005); *United States* v. *Ceballos*, 302 F.3d 679, 690-692 (7th Cir. 2002), cert. denied, 537 U.S. 1136, 537 U.S. 1137,

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[6] The jurisdictional provision at issue in *John R. Sand & Gravel Co.* v. *United States*, No. 06-1164 (Jan. 8, 2008), is also markedly different from Section 851, because it governs the initiation of a claim in the Court of Federal Claims (rather than an ancillary matter such as attorney's fees or a potential sentence enhancement) and also serves "a broader system-related goal" of "limiting the scope of a governmental waiver of sovereign immunity." Slip op. 2-3.

538 U.S. 926, and 538 U.S. 939 (2003); *United States* v. *Dodson*, 288 F.3d 153, 160-161 (5th Cir.), cert. denied, 537 U.S. 888 (2002); *United States* v. *Mooring*, 287 F.3d 725, 727-728 (8th Cir.), cert. denied, 537 U.S. 864 (2002); *Prou*, 199 F.3d at 45-46 (1st Cir.); *United States* v. *Vanness*, 85 F.3d 661, 663 n.2 (D.C. Cir. 1996); see also *United States* v. *Severino*, 316 F.3d 939, 943 (9th Cir.) (en banc) (characterizing Section 851 as a "procedural" statute), cert. denied, 540 U.S. 827 (2003). As petitioner concedes (Pet. 5-7), only the Eleventh Circuit has held that the failure to meet the procedural requirements of Section 851(a)(1) is jurisdictional error. *Harris* v. *United States*, 149 F.3d 1304 (11th Cir. 1998).

Notwithstanding that difference among the circuits, review is unwarranted at this time. Since 2000, the clear trend in the circuits is to hold that Section 851(a)(1) is not a jurisdictional statute. Some of the cases—including the Sixth Circuit's decision in *Pritchett*, which postdates the decision at issue here—have relied on this Court's recent statements that "jurisdiction" ordinarily refers only to a court's subject-matter jurisdiction or to personal jurisdiction. See *Pritchett*, 496 F.3d at 542-547 (discussing *Eberhart* and *Kontrick* and other court of appeals cases that have relied on them). By contrast, the Eleventh Circuit's 1998 decision in *Harris* predates not only *United States* v. *Cotton*, *supra*, and other decisions from this Court restricting the definition of "jurisdiction" but also the decisions from other courts of appeals that have taken cases like *Eberhart* and *Kontrick* into account in holding that Section 851's timeliness requirement is not a jurisdictional one. Accordingly, the Eleventh Circuit should be given an opportunity to re-

consider its ruling in *Harris* before this Court grants review on this issue.[7]

2. Petitioner contends (Pet. 11-17) that the court of appeals misapplied the plain-error test, because its conclusion that any error was not plain was apparently based on the lack of controlling Supreme Court or circuit precedent on the issue. He argues that the court of appeals "create[d]" a circuit split, Pet. 11, and erred by failing to consider out-of-circuit authority holding that, in order to be filed "before trial," a Section 851(a)(1) information must be filed before voir dire begins. Several reasons, however, counsel against further review by this Court: although there is no firm rule about when out-of-circuit authority must control the outcome of an inquiry into plain error, the Fourth Circuit has repeatedly recognized the potential value of out-of-circuit authority in evaluating how "plain" an alleged error is; petitioner overstates the supposed uniformity of the out-of-circuit authority about Section 851; and, even assuming any error here was plain, petitioner cannot establish the other predicates of the plain-error test.

a. For an error to be plain, it must be "clear" or "obvious" under current law. *United States* v. *Olano*, 507 U.S. 725, 734 (1993). Out-of-circuit authority can be relevant to that inquiry, but it is neither necessary nor always sufficient. An error is usually not plain when the courts of appeals are split on the issue. See, *e.g.*, *United States* v. *Smith*, 402 F.3d 1303, 1323 (11th Cir.), vacated on other grounds, 545 U.S. 1125 (2005); *United States* v. *Diaz*, 285 F.3d 92, 96 (1st Cir. 2002). A court of appeals

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[7] The Eleventh Circuit has restated in *dicta* that a Section 851(a)(1) error is jurisdictional, see *United States* v. *Ramirez*, 501 F.3d 1237, 1239 (2007), but it did not reverse the sentence on jurisdictional grounds.

may conclude that an error is plain on the basis of within-circuit authority. See *United States* v. *Alferahin*, 433 F.3d 1148, 1157 (9th Cir. 2006). An error in failing to follow a legal norm may even be plain in some cases where there has been *no* prior judicial construction of the statute or rule in question. See *United States* v. *Joaquin*, 326 F.3d 1287, 1293 (D.C. Cir. 2003).

Nevertheless, no rule requires a court of appeals to hold that an error is "plain" simply because other courts of appeals have found a particular procedure to be erroneous.[8] If the Fourth Circuit had to find that the filing of a Section 851(a)(1) information after voir dire was a "plain" error based solely on the prior existence of out-of-circuit authority, that would effectively bar the Fourth Circuit from making its own evaluation of the

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[8] The cases cited by petitioner (Pet. 13-15) relied on out-of-circuit authority to hold that an error was "plain," but they did not hold that a court of appeals *must* find that an error is "plain" based on out-of-circuit authority. Many of the decisions petitioner cites relied on out-of-circuit authority *along with* other factors. See *United States* v. *Gore*, 154 F.3d 34, 47 (2d Cir. 1998) (out-of-circuit authority, and analogous Supreme Court and within circuit authority); *United States* v. *Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994) (same); *United States* v. *Munoz-Franco*, 487 F.3d 25, 55-56 (1st Cir. 2007) (out-of-circuit authority and government concession), cert. denied, 128 S. Ct. 678, 127 S. Ct. 679, and 128 S. Ct. 682 (2007); *United States* v. *Leonard*, 157 F.3d 343, 345-346 (5th Cir. 1998) (out-of-circuit authority and the court's own determination that the Sentencing Guidelines clearly required the result that favored the defendant); *United States* v. *Hardwell*, 80 F.3d 1471, 1483-1484 (10th Cir. 1996) (out-of-circuit authority that followed the reasoning of a Supreme Court decision). In *United States* v. *Chea*, 231 F.3d 531 (9th Cir. 2000), the Ninth Circuit relied on out-of-circuit authority to find that a Sentencing Guidelines error was "plain" but it did not hold that a court *must* find that an error is "plain" based on out-of-circuit authority.

issue in a subsequent case in which the issue is directly presented to it.[9]

In any event, petitioner's contention (Pet. 12-13) that the Fourth Circuit's decision reflects a determination not to consider out-of-circuit authority is refuted by repeated statements from the Fourth Circuit that out-of-circuit authority may be relevant in determining whether an error is plain. See *United States* v. *Ellis*, 326 F.3d 593, 596-597 ("An error is clear or obvious 'when the settled law of the Supreme Court or this circuit establishes that an error has occurred. In the absence of such authority, decisions by other circuit courts of appeals are pertinent to the question of whether an error is plain.'"), cert. denied, 540 U.S. 907 (2003) (quoting *United States* v. *Neal*, 101 F.3d 993, 998 (4th Cir. 1996)). To the extent that the Fourth Circuit's failure to address any out-of-circuit authority in this case implies that it follows a different rule from the one in *Ellis* and *Neal*, that court should be left to resolve that internal dispute in the first instance. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

b. Even if the Fourth Circuit was under an obligation to look at out-of-circuit precedent, petitioner overstates the supposed uniformity of that precedent. It is not altogether clear whether the term "before trial" in

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[9] Petitioner suggests (Pet. 16) that, if the Fourth Circuit disagreed with the other circuits, it should simply have held that the government's Section 851(a)(1) information was in fact timely. But that is inconsistent with the premises of plain-error review, which do not require the court to decide the threshold question of error. See *Olano*, 507 U.S. at 737 ("assum[ing] without deciding" that "there was indeed an 'error,'" but finding no effect on substantial rights). The entire point of the "obviousness" requirement is to protect a district court from reversal when its failure to raise an issue on its own motion was not unreasonable in light of existing law.

Section 851(a)(1) means "before voir dire begins" (as petitioner contends) or at some other time (such as before the jury is sworn). Five courts of appeals have stated that it means before voir dire or jury selection. *Prou*, 199 F.3d at 48 (1st Cir.); *United States* v. *White*, 980 F.2d 836, 842 (2d Cir. 1992); *United States* v. *McAllister*, 29 F.3d 1180, 1183 (7th Cir. 1994); *United States* v. *Johnson*, 944 F.2d at 407 (8th Cir.); *United States* v. *Gonzalez-Lerma*, 14 F.3d 1479, 1484 (10th Cir.), cert. denied, 511 U.S. 1095 (1994). The issue in the Eleventh Circuit, however, is unclear. In *United States* v. *Rice*, 43 F.3d 601 (1995), the Eleventh Circuit held that a Section 851(a)(1) information was timely filed "[o]n the day [the defendant's] trial began, but before the jury was empaneled," which may have been after voir dire had begun. *Id.* at 603-604. Moreover, when the District of Columbia Circuit held that a pre-voir-dire filing was timely under Section 851(a)(1), it expressly declined to decide when a trial begins under Section 851, thus leaving open the possibility that the information in a case like this one could be timely. *United States* v. *Brown*, 921 F.2d 1304, 1308-1309 n.6 (1990).[10]

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[10] Before this case, the Fourth Circuit had not decided the issue either. In *United States* v. *Jones*, 78 Fed. Appx. 844 (2003), cert. denied, 540 U.S. 1137 (2004), the Fourth Circuit affirmed a conviction that raised the issue without a majority opinion. One judge found it unnecessary to decide the issue. *Id.* at 848 (opinion of Williams, J.). Another judge, rejecting the majority rule, concluded that a Section 851(a)(1) information is timely if it is filed (as it was in this case) before the jury is sworn. *Id.* at 852 & n.3 (opinion of Shedd, J.). A third judge would have followed the majority rule pressed by petitioner here. *Id.* at 856-857 (Michael, J., dissenting). Judge Michael was also on the panel in this case and evidently did not believe that the out-of-circuit authority made the alleged error obvious.

Moreover, as petitioner concedes (Pet. 11 n.1), the Sixth Circuit has held that a Section 851(a)(1) information was timely because it was filed before the jury was sworn. *United States* v. *Galloway*, No. 94-3173, 1995 WL 329242, at *8 (May 31, 1995). Although *Galloway* was an unpublished decision, the Sixth Circuit currently permits parties to cite unpublished opinions. See Sixth Cir. R. 28(g) ("[c]itation of unpublished opinions is permitted"); see also Fed. R. App. P. 32.1 advisory committee note (2006) ("The citation of unpublished opinions issued before January 1, 2007, will continue to be governed by the local rules of the circuits."). Accordingly, the Sixth Circuit could well follow *Galloway* in a published decision in the future.

The court of appeals correctly held that there was no plain error in the pre-jury-swearing filing of the Section 851(a)(1) information given the absence of precedent from this Court or the Fourth Circuit, as well as the Fourth Circuit's previous observation that the term "before trial" is "surely ambiguous," since it means different things in different contexts. Pet. App. 9a-10a. Cf. *Serfass* v. *United States*, 420 U.S. 377, 388 (1975) (holding that jeopardy does not attach until the jury is sworn). That the court of appeals did not rely on the out-of-circuit authority was immaterial because the out-of-circuit authority is not uniform and there is thus no reason to believe it would have changed the Fourth Circuit's conclusion.

c. Even if the district court plainly erred in treating an information that was filed two weeks before the jury was sworn as "before trial," petitioner could not meet the other prongs of the plain-error test, which require him to show not only that the error affected substantial rights, *United States* v. *Dominguez-Benitez*, 542 U.S.

74, 83 (2004), but also that the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings," *Johnson* v. *United States*, 520 U.S. 461, 470 (1997) (internal quotation marks omitted; brackets in original).

The substantial-rights inquiry of the plain-error test requires a defendant to show a reasonable probability that the result of the trial (or sentencing proceeding) would have been different without the error. *Dominguez-Benitez*, 542 U.S. at 82. Yet, as explained above (at 7-8, *supra*), petitioner could not have been prejudiced because his sentence was enhanced under Sentencing Guidelines § 4B1.1 and did not exceed the *unenhanced* statutory maximums under Sections 841(b)(1)(B) and 851. Moreover, reversal of petitioner's sentence now would not be likely to lead to a shorter sentence on remand because the district court indicated that it would have imposed a *longer* term of imprisonment if the Guidelines did not apply. C.A. App. 924.

Similarly, the "public reputation of judicial proceedings" would not be impaired by allowing petitioner's sentence to stand. In *Cotton*, the Court held that the erroneous omission of drug quantity from an indictment that enhanced a defendant's sentence under Section 841(b) did not implicate the "public reputation of judicial proceedings" prong where the evidence of drug quantity was "overwhelming" and "essentially uncontroverted" at trial. 535 U.S. at 633. *Cotton* emphasized that, in providing for graduated penalties for drug trafficking in Section 841(b), Congress intended for dealers in large quantities in drugs to be sentenced to more severe terms than those dealers involved in lesser quantities. Therefore, the real threat to the "public reputation of judicial proceedings" would be to impose lesser sentences on

large-scale drug dealers because of errors that were forfeited at trial. *Id.* at 633-634; see also *Johnson*, 520 U.S. at 470.

That rationale also applies here. Congress provided for enhanced sentences for drug recidivists. Congress also barred defendants from challenging the validity of prior convictions that are more than five years old under Section 851(e). Because petitioner's prior convictions are essentially undisputed—and because the district court indicated that petitioner actually deserved a *longer* sentence than the one he received under the then-mandatory Guidelines—sentencing him as the recidivist that he is did not adversely affect the "public reputation of judicial proceedings."[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[12] Petitioner contends (Pet. 16) that the court of appeals' alleged error results in an injustice based "on an accident of geography or timing." But the plain-error test already contemplates the possibility of such disparate outcomes, because it unquestionably will result in the denial of relief whenever there is a split in the circuits that prevents an error from being considered plain in the first place in circuits that have not addressed the issue.